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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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JUL 21 2008

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

VICTOR PARRA

Plaintiff

v.

R. HERNANDEZ et al.,

Defendants

Case No. 08CV0191 H CAB

ANSWER TO DEFENDANTS MOTION TO DISMISS

Hearing : July 22, 2008

Time : 9:00 a.m.

Courtroom : E

Judge : The Honorable
Cathy Ann Bencivengo

I

INTRODUCTION

Plaintiff Victor Parra, a prisoner at Richard J. Donovan Correctional Facility ("RJDCF") in San Diego California, and proceeding pro se, Submitted a Civil Rights Complaint pursuant to 42 U.S.C Section 1983. Plaintiff asserts he suffers from a mental illness requiring participation in psychiatric programs, and classified as sensitive needs yard (SNY) [Protected Custody] alleges various RJDCF officials violated his right to be free from cruel and unusual punishment, retaliated against him, and violated his right to due process in the defendants failure to give plaintiff constructive notice of a Rule or Regulation, failure to give him any kind of hearing regarding deprivation of a liberty interest in out door exercise or afford him due process before placement on atypical conditions of confinement, when

1 he was transfer to Unit 8 for refusing to sign a waiver in order to be double celled
 2 with an inmate who was not compatible and who plaintiff believed would assault him.
 3 (Compl. par. 1-23) plaintiff alleges he was deprived of outdoor exercise and
 4 decompensated due to the isolation and denial of all outdoor exercise and limited
 5 if any recreational state provided reading material. Plaintiff further alleges pendant
 6 violations of California law. (Id. par. 53-115) Plaintiff seeks a declaratory judgment
 7 compensatory damages and cost (Id. at 16 par. 1-11.)

8 II

9 DEFENDANTS MOTION TO DISMISS

10 a) Federal Claims

11 1. Eight Amendment Claims

12 On deprivation of outdoor exercise (a human need) defendants only chaleng the
 13 cause of action against defendants Limon and Liles. Motion to Dismiss (MD) (at p. 7
 14 par 1-17) defendants argue a "disconnect" (MD p. 7 par. 11-12) and discussed
 15 causation as a required element of a 1983 claim (MD p. 7 par. 18-23).

16 As plaintiff stated. Denial of outdoor exercise was spawned on September 25,
 17 2006 by Limon, Lile and Captain Cora. (Compl. at 3 par 7). and continued until April
 18 2007. Thus the affirmative link or connection between defendants action and the
 19 claimed deprivation. Motion to dismiss on this ground should be dismissed and denied.

20 Cause of action II naming all defendants excepting the CDC. "...When they
 21 were deliberate indifferent to plaintiff's likelihood of decompensation mental illness and
 22 subjected him to their created 24 hour isolation..." Id at (Compl p. 4 par. 18). defendants
 23 only opposed this claim against Limon and Liles (MD p. 7 par. 1-17) and claim "Limon and Liles
 24 have no liability for the conditions of confinement of which plaintiff complains." (MD p. 7
 25 par 22-23). it takes the action of the unit sergeant and Facility Captain to perform
 26 a unit transfer and a staff witness. See (Compl at 55 box 2 and 4) plus
 27 the moving force of an employee using a "yard hold" as coercion. see (Compl at 20)
 28 (Defendant Limon placing a yard hold and at SI officer Garcia placing a yard hold on

Inmate Robinson) because the initial yard hold is implemented permanently, it requires the officer and Unit Sergeant to be the moving force of the unit transfer and the Captain to approve the transfer. Thus causation is linked. Defendants Limon and Liles and Cota are required to review Institutional Classification Committee (ICC) exhibit at (Compl. p. 42) which defendants Limon, Liles and Cota did, see CDC 115 at (Compl. at 20 par 1 line 3) stating "cell status by ICC..." and Limon Liles and Cotas name on the form. and they knew when they review ICC action (Compl. at 42 line 8-9) "that plaintiff suffered the likely hood of decompensation" as alleged at (Compl. p. 4 par. 14) Defendant Hernandez, Cowan and Cota created policies and procedures and were willfully blind to constitutional violation by creating a 24 hour Isolation Unit and issue "Yard Hold" indefinitely being the moving force and deliberate Indifferent when they placed plaintiff in Unit 8 where they knew constitutional outdoor exercise was not provided. and at unit 7 after 80 days without yard where they knew yard was limited. Defendants argument of Causation must be denied, they were deliberate indifferent to plaintiffs mental illness (medical needs) as stated at (Compl. p. 4 par. 18)

In Cause of action ~~III~~ defendants Limon, Liles and Cota's torturous methods causing causing serious psychological pain in order to double cell plaintiff when they knew he was a mentally ill patient directly violated plaintiffs eighth amendment rights defendants motion to dismiss should be denied because there is a direct link of defendants to the violation and both objective the infliction of psychological pain and subjective, their knowledge of plaintiff illness were meet and alleged both elements at the complaint.

2. Retaliation

Plaintiffs Cause of Action I, he argue that Liles, Limon and Cota state employees issue "RVR at Exb A." (Compl. p. 3 par 6) Took adverse action; because of; Plaintiffs protected conduct "Protection from bodily harm Civil Code Sec. 43" (Compl. p. 3 par. 9); And Chilled plaintiffs exercise to protection from bodily harm when "Plaintiff agreed to double cell with Duran with the condition that plaintiff would not sign the agreement and will file a suit if plaintiff was assaulted" (Compl. p. 3 par 6) and denied and chilled protection by suit or bodily harm

1 when they issued RVR at Comp.p.20. There is no penological goal in staging inmate fights
 2 after "Plaintiff explained to Limon that Duran was not compatible with him and would
 3 assault plaintiff..." (Compl. p. 3 par. 4). Plaintiffs conduct and right to discussion
 4 with the appropriate staff" see (Compl. at 23, CDC Form 602. Top of form line 1-3).
 5 is protected as "speech" when plaintiff discussed the problem with Limon and liles.
 6 Plaintiff failed to state this on the complaint but will on an amended complaint.
 7 thus retaliation for engaging in limited protected speech within the scope
 8 of the CDC 602 form. right to protection Civil Code 43

9 3. Unreasonable Seizure.

10 Defendants position of the IV Cause of action (Compl p. 8 par. 24-28) is
 11 that as an inmate plaintiff does not have Fourth Amendment protections. It is
 12 recognized by numerous courts of Law that the reasonableness in search and
 13 seizures extends to incarcerated prisoners. Defendants Motion to Dismiss this issue
 14 should be denied.

15 4. Due process claims.

16 On plaintiffs transfer to unit 8 creating atypical hardship (Compl. at
 17 8-9 par. 29-35) Cause V defendants alleged plaintiff was only subjected to a
 18 departure of ordinary incidents of prison life for 21 days not causing atypical and
 19 significant hardship (MD. at 11 par 19-23); On failure to give constructive notice of a
 20 Rule or Regulation (Compl at 9 par. 36-42) Cause VI defendants alleged plaintiff was
 21 given verbal notice by limon and liles the day the yard hold on plaintiff was
 22 implemented (MD. at 12 par. 2-8); On deprivation of liberty interest without due
 23 process Cause VII (Compl p. 10 par 43-46) Defendants do not address the facts of this
 24 cause of action. it is addressed on a one liner at (MD at 12 par. 27-28); On
 25 deprivation of liberty interest (in ones Classification) Cause VIII (Compl. at 10)
 26 defendants alleged [non Cognizable claim] under due process concerns (MD. at 12
 27 par. 11-15 at 14-15). Due process was required before or after deprivation of
 28 liberties in ones aquired interests.

To determine whether a liberty interest has been created by state law, the Court must inquire into (1) whether state status or regulations restrict the power of prison officials to impose the deprivation; (2) whether the liberty in question is one of "real substance." A liberty interest of real substance occurs when deprivation places "an atypical or significant hardship on plaintiff in relation to the ordinary incidents of prison life." Plaintiff alleged on the fifth cause of action that defendants Limon and Liles "...without first conducting a review of inmate statements that inmate duran was incompatible and of plaintiff and durans case factors ... required by the double cell review ..." (Compl. at 8 par. 30.) see factors at (Compl. p. 55 Double Cell Review Form at 2 and 3) Five factors would preclude the double celling, Factor 5 "... may threaten institutional security or safety of others." restricted Limon, Liles and Cota to order double celling but as Lt. Pederson found "... All available information sources were not review ..." (Compl. p. 8 par 27). Plaintiff privileges Library, Law Library, yard and environmental stimulation to his mental illness are of "real substance" and the 24 hour Isolation for 80 days place plaintiff in atypical and significant hardship in relation to the amenities already aquired at unit 6 (Compl. p. 9 par 33) thus Limon, Liles and Cota failure to perform a substantive attempt to verify or disprove plaintiff safety concerns against Duran restricted their power to impose a "yard hold" and 24 hour Isolation at Unit and thus violated plaintiffs Due process. Defendants Motion should be denied on this cause of action.

Defendants failure to give fair notice of a rule before being sanction for its violation violated Due process. two hour notice is not fair notice when vague verbal notice is given. defendants Motion to Dismiss should be denied on this ground. (Cause VI).

Cause of Action VII. Defendants, Limon, Liles, Cota, Cowan and Hernandez deprived plaintiff of yard a liberty interest starting on September 25, 2006. The yard hold was implemented two hours after plaintiffs refusal to double cell or signed the agreement. Limon, Liles and Cota were the moving force. On October 10, 2006 This moving force action, the yard hold spawn the CDC 115, Rule violation requiring defendants Cota Cowan and Hernandez torturous approach to Isolate plaintiff at Unit 8. The loss of liberty interest

1 in outdoor exercise required a hearing before or after. When some type of hearing was
 2 denied the Due process violation was denied and completed. The yard hold was never address
 3 even after plaintiff was transfer to unit 7 receiving less than the yard time legally required.
 4 Defendants Motion to Dismiss must be denied

5 Liberty Interest in ones classification exist where a liberty is derived by
 6 that classification. (Compl. at 10.) Defendants confused plaintiffs eighth amendment
 7 claims. Plaintiff made no Failure to protect claims, all defendants deprived plaintiff of
 8 freedoms created by the Safety Concerns classification. protection is required by such
 9 classification. Inmates Sandora and Robinson general population inmates were classified as
 10 safety concerns temporarily and interacted with plaintiff at the same yard. Inmate duran was in
 11 a Gang group yard after plaintiff was ask to double cell with Duran, the next Inmate having
 12 contact with him was stabbed on the face and neck with a chunk Duran fashion from a
 13 teflon spoon. Plaintiffs classification comes along with protection from other inmates.
 14 because Defendants and all of them knew plaintiff would be place in yard hold and then
 15 a 24 hour Isolation Due process was due. Established at the double cell agreement form
 16 (Compl. at 55). Defendants argue plaintiff "double up" constitutional claims (MD. p. 12 par 16)
 17 alleging claim VIII is an Eighth Amendment claim. plaintiff here in par. 5 to 17 supra or
 18 (Complaint at 10 par 47-51 and p. 11 par 52.) does not alleged infliction of pain as the
 19 violation. but denial of process due before he is subject to condition violative of eighth
 20 amendment standard. process never given. defendants Motion to Dismiss must be denied.

21 b) State claims

22 1) Ninth Cause of action state Unreasonable seizure (Compl. at 11)

23 Defendants alleged a simple transfer from unit to unit at the prison is not violative of the
 24 state's peoples rights. (MD. at 13 and 14 at 14 par. 11-13) the watch word of the U.S. Cons.
 25 Fourth amendment, and no cogent reason for this court to depart from the Fourth Amend.
 26 analysis construing a provision of the state Constitution is "reasonableness". Defendants
 27 24 hour Isolation and Yard hold used as coercion to double celled plaintiff constituted a
 28 seizure at Unit 8. these Coercion is unreasonable. Def. Motion to Dismiss should be denied.

2) Interference with the exercise of Civil Rights Causes of action Ten, eleven, Twelfth and Thirteenth. Plaintiff draw these actions by California Civil Code S 2. 1 (a) and (b). But miswrote the section as S 2 (a). Section S 2 (a) requires allegation of some race based or class discrimination. Section S 2. 1 (a) and (b) requires that an attempt or deprivation of a right be done by coercion, intimidation or threat. Plaintiff Cause of action Eighteenth reflects his intended purpose (Compl. p. 15 par. 110-114). Defendants Challenge is causation as the same defect of the eighth amendment claims (MD p. 14 par 24-28 and p. 15 par. 1-2) The court may assume cause of action eighteenth cures the defect or may give plaintiff an opportunity to amend the complaint.

3) Cause of action Fourteenth and Fifteenth. (Compl. at 13-14) defendant alleged causation the same as the eighth amendment claims. (MD p. 14 par 24-28 and p. 15 par 1-2). plaintiff alleged "... defendants and all of them infringed upon plaintiff rights as stated on par 1 to 80 supra" (Compl. at 13 par 83) Yes, this argument is redundant, plaintiff has to allege with specificity what each defendant did to breach duties alleged at par. 84. plaintiff should be given an opportunity to cure these defects. the Fifteenth Cause of action is properly stated. Def. Mot. to Dismiss should be denied.

4) Negligence. plaintiff alleges defendant that "... (OP) #85 does not requires that yard be used as punishment" (Compl. at 14 par. 99) defendants alleged "notice" as plaintiff's defect (MD at 15 par. 3-9) Defendants Interpret Operational Plan # 85 as "refusing an order to double cell" see (Compl at 20 "specific acts" [Box] CDC IIS Form) and as ("willfully - Delaying / Obstructing a peace officer in performing of duties") (Compl. at 51. "Specific act [box] CDC IIS Form). their negligence resulted in plaintiff injuries loss of yard ext. thus the Cause of action is stated. Notice of Rules is required by CCR section 3002 subsections (a), (b) and (c). plaintiff drew upon Government Code Sec. 11340.5 (a). he should be given an opportunity to amend the complaint and defendants Mot. to dismiss denied. on 16 Cause of ac. Cause of action Seventeenth suffers from the same defect of notice drawn upon the Government code as the source of duty imposed on defendants. CCR section 3002 should be the source of duty imposed. Amending the complaint will cure the defect. def. Mot. Diss. should be denied.

1 5) The eighteenth Cause of action This cause of action is redundant and plaintiff
2 again alleges preceeding paragraphs to link defendants. it should be amended to specified what
3 each defendant did. Defendants Motion to dismiss should be denied
4

5 CONCLUSION

6 Defendants actions are subject to scrutiny under section 1983. Defendants
7 Motion to Dismiss should be denied and plaintiff given an opportunity to cure any defects.

8 Unserved defendants will be served timely and would not be dismissed.

9 Dated July 12, 2008.

Respectfully Submitted

Victor Parra

In pro se

VERIFICATIONSTATE OF CALIFORNIA
COUNTY OF SAN DIEGO

Case No. 08 CV 0191 H CAB

(C.C.P. SEC.446 & 201.5; 28 U.S.C. SEC. 1746)

I, Victor Parra Plaintiff DECLARE UNDER PENALTY OF PERJURY
 THAT: I AM THE Plaintiff IN THE ABOVE ENTITLED ACTION;
 I HAVE READ THE FOREGOING DOCUMENTS AND KNOW THE CONTENTS THEREOF AND THE SAME IS
 TRUE OF MY OWN KNOWLEDGE, EXCEPT AS TO MATTERS STATED THEREIN UPON INFORMATION, AND
 BELIEF, AND AS TO THOSE MATTERS, I BELIEVE THEM TO BE TRUE.

EXECUTED THIS 12 DAY OF JULY 2008 AT Richard J.
Donovan Corr. Fac. San Diego CA 92179

(SIGNATURE) Victor Parra
 (DECLARANT/PRISONER)

PROOF OF SERVICE BY MAIL

(C.C.P. SEC.1013 (a) & 2015.5; 28 U.S.C. SEC.1746)

I, Victor Parra AM A RESIDENT OF Richard J. Donovan Corr. Fac. San Diego
County STATE OF CALIFORNIA. I AM OVER THE AGE OF EIGHTEEN (18) YEARS OF AGE AND AM /NOT/
 A PARTY OF THE ABOVE-ENTITLED ACTION. MY STATE PRISON ADDRESS IS: P.O. BOX 799002, San Diego
CA 92179

ON July 12 2008 I SERVED THE FOREGOING: Answer to defendants
Motion to Dismiss

(SET FORTH EXACT TITLE OF DOCUMENTS SERVED)

ON THE PARTY (S) HEREIN BY PLACING A TRUE COPY (S) THEREOF, ENCLOSED IN A SEALED ENVELOPE (S),
 WITH POSTAGE THEREON FULLY PAID, IN THE UNITED STATES MAIL, IN A DEPOSIT BOX SO PROVIDED
 AT Richard J. Donovan Corr. Fac. P.O. Box 799002, San Diego CA 92179

(To the Clerk)
 United States District Court
 Southern District of California
 880 Front Street, Suite 4290
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THERE IS DELIVERY SERVICE BY UNITED STATES MAIL AT THE PLACE SO ADDRESSED, AND THERE IS
 REGULAR COMMUNICATION BY MAIL BETWEEN THE PLACE OF MAILING AND THE PLACE SO ADDRESSED.
 I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATE: July 12, 2008

Victor Parra
 (DECLARANT/PRISONER)